IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-306

PASSAIC VALLEY WATER COMMISSION, *et al.*,

*Petitioner,*

*vs.*

STATE OF NEW JERSEY, *et al.*,

*Respondents.*

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

## BRIEF IN OPPOSITION


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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8512-13

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## BRIEF IN OPPOSITION

### Counter-Statement of the Question Involved

Is it an appropriate exercise of the State police power to order a public corporation operating a water supply system for eight municipalities which are contractually and statutorily committed to comply with State and federal water supply standards, to meet those standards?

## Counter-Statement of the Case

Respondent North Jersey District Water Supply Commission is a public corporation created pursuant to N. J. S. A. 58:5-1 *et seq.* for the purpose of making adequate supplies of potable water available to contracting municipalities.

Eight municipalities contracted with North Jersey in 1918 for the construction and operation of the Wanaque reservoir at Wanaque, New Jersey. Under the contract the eight participating municipalities are to share in the costs and receive water from the Wanaque reservoir in specified proportions. Petitioner Passaic Valley Water Commission, a public corporation created in 1927 pursuant to N. J. S. A. 40:62-108 *et seq.*, serves as agent for three of these municipalities, which together share in 37.-75% of the Wanaque reservoir's water and costs.

The contract between North Jersey and its eight constituent members authorizes North Jersey to maintain, repair and operate the system constructed for its members and to prevent or remove pollution from its water supply, all at the contracting municipalities' expense. North Jersey retains sole ownership and control of the facilities, in trust for the contracting municipalities and such other municipalities as may be entitled to participate. N. J. S. A. 58:5-24.

North Jersey's present system consists essentially of the Wanaque Reservoir and a 21 mile aqueduct running south from the reservoir, connecting with several other major water sources and with its member towns along the way. At present, treatment of the water as it leaves the Wanaque Reservoir is limited to screening, chlorination, ammoniation and lime.

While sharing in 37.75% of North Jersey's Wanaque supply and costs, petitioner also distributes water from the Passaic River to its three member municipalities. Where the Passaic River supply interconnects with the Wanaque reservoir supply, petitioner pretreats river water and filters it in a gravity filtration plant. It also filters Wanaque water through a pressure filtration plant originally installed in 1929 for filtering Passaic River water but subsequently converted to the treatment of Wanaque water. After filtration and treatment, water from both sources is mixed and transmitted to petitioner's customers.

The State has classified the waters flowing into the Wanaque reservoir as class 3 water, requiring pretreatment, filtration, and disinfection for use as a public potable water supply. Water transmitted from the Wanaque headworks has not met State and federal potable water standards since 1965.

On January 24, 1966, the Commissioner of Health issued an order to North Jersey requiring it to bring its Wanaque supply into compliance with State and federal potable water standards by January 1, 1968. Upon receipt of this order, representatives of the partner municipalities retained a consultant who eventually concluded that one particular location at the Wanaque headworks was the most advantageous site for a new water treatment plant because it represented the overall lowest cost per million gallons of water at the capacity involved and because it had certain advantages with respect to Statewide water supply management.

In June 1968 the State Department of Health filed a complaint seeking to compel North Jersey to upgrade its Wanaque water treatment facilities in accordance with the 1966 administrative order. In its answer, North Jer-

sey expressed its willingness to comply with the State's order, and in turn filed a third party complaint against its eight member municipalities requesting a declaratory judgment that it possessed the statutory and contractual authority to construct the facilities at their expense. Several of the municipalities, most notably Passaic, Paterson and Clifton (acting through their agent petitioner Passaic Valley), and the City of Newark, filed answers attacking the validity of the underlying State order and disputing the authority of North Jersey to construct the facilities under existing law and contracts and to issue bonds to finance such construction.

On March 4, 1974 the Appellate Division sustained the State order and regulations. *Newark* v. *Dept. of Health of N. J.*, 109 N. J. Super. 166, 262 A. 2d 718 (App. Div. 1970). Thereafter, cross-motions for partial summary judgment were brought in the trial court by North Jersey, Newark and Passaic Valley, resulting in a determination that the third party defendants were required to contribute to the costs of construction and operation of the proposed new filtration plant. By oral opinion of June 26, 1972 and final judgment entered on September 6, 1972 following a plenary hearing, the trial court held that North Jersey's plan to build at the Wanaque headworks was reasonable, that North Jersey has the authority to issue bonds to finance the plan, and that Passaic Valley was entitled to payment by North Jersey of $650,160 for its pressure filtration facilities.

The Appellate Division affirmed the trial court's decision in its entirety, concluding that the State has the statutory authority to compel petitioner to participate in and help pay for a project to improve the water supply system in which it shares by contract with North Jersey,

that the proposed Wanaque project is the one which will most efficiently and economically meet State standards, and that the costs of this project to petitioner do not represent a taking of property for which compensation is required.

A petition for certification filed by Passaic Valley was denied by the New Jersey Supreme Court on July 22, 1974. The decision of the Appellate Division therefore became final, and North Jersey undertook procedures to implement it. The State Supreme Court subsequently denied petitioner's application for a reconsideration of the denial of its petition for certification, while continuing until September 23, 1974 a temporary stay originally imposed upon North Jersey by a single justice on condition that Passaic Valley perfect its petition for certiorari by that date.

On September 18, 1974 Passaic Valley filed a petition for a writ of certiorari with this Court. On September 19, 1974 petitioner submitted to Justice William J. Brennan, Jr. an application for a stay pending disposition by this Court of its petition. Justice Brennan denied that application on September 24, 1974.

## ARGUMENT

**A writ of certiorari should be denied because the State's order requiring North Jersey through its members to upgrade the filtration of water in the Wanaque Reservoir was a proper exercise of the State police power and represents no federal constitutional question.**

The central issues during the long history of this case have been: (1) whether North Jersey has the statutory authority to proceed to comply with the State's 1966 order at the apportioned expense of its member municipalities; and (2) whether North Jersey has chosen a financially and environmentally reasonable method of complying. These issues have required each level of the New Jersey judicial system to interpret the State statutory scheme under which North Jersey operates, and to consider the reasonableness of the proposed Wanaque project in terms of water supply and potability problems in New Jersey. It is therefore clear that the central issues raised in this case are of State rather than federal significance.

The State has the power to control and conserve the use of its water resources for the benefit of all its inhabitants. *City of Trenton* v. *State of New Jersey*, 262 U. S. 182 (1923). Pursuant to this authority the Legislature has, over the years, enacted various statutes which give to the present Department of Environmental Protection broad regulatory and supervisory authority over the construction and operation of potable water supplies in New Jersey. N.J.S.A. 58:11-1, 2 and 3 provide that no person may distribute or sell water for potable purposes without first obtaining from the Department approval of the source and of detailed plans and specifications for any

water treatment facilities which the Department may require. N.J.S.A. 58:11-4 authorizes the Department to supervise and regulate the purity of all potable water supplies in the State, while N.J.S.A. 58:1-10 and 13 give the Department broad authority to plan for the economical and comprehensive development of all potable and public water sources and all watersheds.

By the adoption of N.J.S.A. 58:5-1 *et seq.*, the Legislature created two water supply districts together encompassing the entire State, and provided the district commissions created thereunder with powers sufficient to develop water supplies for any municipality in the State. Municipalities within a particular water district may contract with the district commission for their water supply (N.J.S.A. 58:5-12 through 14), although that contract is only one element in a general scheme of cooperation among the contracting municipalities. The cost of initial construction or acquisition of the water supply for district members is borne by the contracting municipalities in proportion to the amount of water contracted for, N.J.S.A. 58:5-22, and the cost of operation and maintenance after that time is apportioned in the same manner. N.J.S.A. 58:5-23.

Where municipalities have not chosen to join one of the two State water supply districts, the Legislature has made available another form of cooperative activity by the provisions of N.J.S.A. 40:62-108 *et seq.*, which permit two or more municipalities to come together to form a water commission acting for each or all of them. Paterson, Passaic and Clifton originally adopted such a scheme in forming petitioner Passaic Valley Water Commission. In permitting such local groupings for water supply matters, the Legislature did not in any way relinquish broad

State control over water supply. N.J.S.A. 40:62-131; N.J.S.A. 40:62-134; N.J.S.A. 40:62-146. In the present case petitioner, although formed under N.J.S.A. 40:62-108 *et seq.*, has chosen to avail itself of further regionalization through partnership in the North Jersey Water Supply District. The Legislature has made clear that the provisions of N.J.S.A. 40:62-108 *et seq.* shall in no way affect the provisions of N.J.S.A. 58:5-1 *et seq.*, governing a State water supply district and its members. N.J.S.A. 40:62-150.

It was in the context of this comprehensive statutory scheme, and specifically pursuant to N.J.S.A. 58:11-1 and 4, that the State in 1966 ordered North Jersey to improve its water treatment plant at the Wanaque headworks. No party has disputed the State's determination that further treatment of Wanaque water is necessary, but petitioner argued below that in comparison with other possible alternatives the North Jersey plan has been erroneously found economically feasible.* However, the record fully

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* Throughout the long history of this case, petitioner has argued in conjunction with this challenge to the Wanaque plan's economic feasibility that North Jersey does not have the statutory authority to issue bonds to finance the plan, basing this contention on a particular construction of North Jersey's enabling statutes. The State has consistently concurred with North Jersey in its assertion that it has such authority, an assertion accepted by the New Jersey courts. The issue of North Jersey's bonding authority has been presented before each of these courts as one of exclusively statutory construction. Petitioner now seeks to suggest for the first time before this Court that the issue in one of federal constitutional import. By this subterfuge it seeks this court's review of a construction of a State statute by State courts, as well as this court's original determination of that State statute's com-

*(Footnote continued on following page)*

supports the conclusion reached by all levels of the New Jersey court system that the Wanaque plan is the most efficient and feasible of the possible alternatives, both technically and economically, in meeting the State's order to North Jersey to bring its water supply up to State standards.

This conclusion, based on evidence concerned with local and State-wide water supply planning and policy conducted within a comprehensive State statutory scheme, is clearly one to be drawn by the State courts, and presents no question of federal or constitutional import of interest to this Court. The only federal issue put forward by Passaic Valley is that to charge to it the cost of its share of the Wanaque project and to reimburse it for the replacement cost of its filtration plan less depreciation would constitute a taking without compensation.

Initially it must be noted that the State is prohibited by the Fifth and Fourteenth Amendments to the United States Constitution from taking *private* property without compensation. It is clear that a filtration plant owned and operated by a public corporation such as petitioner acting as agent for three municipalities is not private property, and that therefore even if a "taking" could

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*(Footnote continued from preceding page)*

pliance with the New Jersey Constitution. U.S. Supreme Court Rule 23(1)f makes clear that where a federal question is not properly and timely raised in a State case, this Court does not have jurisdiction to review the judgment on a writ of certiorari. Even if this were not the rule, it is clear that the State courts' interpretations of North Jersey's statutory authority do not raise a genuine constitutional question, for the reasons set forth *infra* in response to petitioner's allegations of a taking without compensation.

be shown, no compensation would be required. Municipalities cannot as instruments of the State invoke constitutional questions against it. The constitutional guarantees are designed to protect private citizens from State infringements of private rights, not to protect one arm of the State from the State itself. *City of Trenton* v. *State of New Jersey*, *supra*, 262 U. S. at 185-186.

Even assuming private property were involved in this case, it is settled law that a proper exercise of the police power does not give rise to a right to compensation, even though the value of property may consequently be reduced. Specifically, it is unquestionably within the State's police power to control and conserve the use of its water resources for the benefit of all its inhabitants. The State may establish standards for potable water quality and direct distributors of potable water to take steps necessary to achieve compliance with those standards. *City of Trenton* v. *State of New Jersey*, *supra*, 262 U. S. 182. In the present case the New Jersey courts have found the State's order and acceptance of the North Jersey plan to be a proper and reasonable exercise of the State's police power. Thus any "loss" petitioner may suffer as a result of the State order and court judgment will be a direct consequence of a proper exercise of the police power.

It is also well settled that when the State acts pursuant to the police power to provide safe and adequate potable water supplies through improvement of existing facilities or new construction, and its action is reasonable, the consequences to others who are injured because of competition, obsolescence, or because their existing facilities become unnecessary, are not such as to require compensation under the State or federal Constitutions. *Madera Waterworks* v. *Madera*, 228 U. S. 454 (1913). *See also*

*Denver* v. *New York Trust Co.*, 229 U. S. 123 (1913). In *Madera Waterworks*, plaintiff private water company, acting under municipal regulation, constructed a water plant and laid water pipes. Thereafter the municipality decided to construct its own water facilities pursuant to State statutory authority. Plaintiff argued that the resulting "ruinous competition" by the city would "destroy the plaintiff's property, contrary to the 14th amendment." 228 U. S. at 456. While accepting the premise that the competition was "ruinous" and would destroy plaintiff's property, Justice Holmes found no constitutional infirmity. Since the city was legally authorized to build waterworks, "plaintiff took the risk of what might happen." *Id.*

In the present case the construction of additional treatment facilities by North Jersey to remove and prevent pollution of the water was permitted by statute and authorized by contract. Thus petitioner, in choosing to build its own filtration plant while at the same time sharing in North Jersey's development, assumed the risk that such development might occur in the future, rendering its own plant unnecessary. Petitioner's resulting "loss" is thus clearly not one for which compensation must constitutionally be made.

## CONCLUSION

**For all the foregoing reasons, it is respectfully submitted that Passaic Valley's petition for a writ of certiorari should be denied.**

Respectfully submitted,

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